No. 91-640

In the Supreme Court of the United States

OCTOBER TERM, 1991

PIZZACO OF NEBRASKA, INC., d/b/a DOMINOS PIZZA ET AL., PETITIONERS

v.

LANGSTON BRADLEY AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether a prima facie case of an employment practice's disparate impact can be made by unrebutted statistical evidence of the disproportionate effect of the employer's policy on black males, without reference to the bottom-line effect of the practice in the particular employer's work force.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. a1-a6) is reported at 926 F.2d 714. The opinion of the court of appeals on denial of rehearing (Pet. App. a8-a15) is reported at 939 F.2d 610. The district court's oral opinion (Pet. App. a16-a28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1991. A petition for rehearing with a suggestion for rehearing en banc was denied on

July 24, 1991 (Pet. App. a7). The petition for a writ of certiorari was filed on October 15, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are companies in the business of producing and selling pizzas to the public, mostly via home delivery. Pet. App. a17. Petitioner Pizzaco of Nebraska, Inc., does business as "Domino's Pizza," and is a franchise of petitioner Domino's Pizza, Inc. *Ibid.* Petitioners require as a condition of employment that all employees adhere to a no-beard policy. *Id.* at a18. Respondent Langston Bradley was employed by petitioner Pizzaco as a driver from September 4 to 17, 1984, when he was discharged for "failure to comply with the no beard policy of Pizzaco." *Id.* at a19.

Bradley is a black male who has suffered from pseudofolliculitis barbae (PFB) since he began shaving over 20 years ago. Pet. App. a17. PFB is a condition "caused by sharp tips of recently shaved facial hair penetrating the skin and causing an inflammatory reaction." *Ibid.* PFB may cause permanent scarring, hyperpigmentation, and disfigurement. C.A. App. 183-186. Dr. Melvin Alexander, respondents' medical expert at trial, testified that 45% of black males whom he has studied or treated have diagnosable cases of PFB, and that "half of that group had it a level that we would consider moderate at least." C.A. App. 198. Shaving abstinence is indicated as a treatment at the moderate to severe levels. C.A. App. 182-183. Thus, between 20% percent and 25% of black males Dr. Alexander has observed have cases of PFB of such severity that they suffer moderate to severe shaving difficulty, and "shaving abstinence

would be a strong consideration * * * in their therapy." C.A. App. 198; see also *id.* at 213, 429-431. In a proffer that the court of appeals held should have been admitted into evidence,[1] Dr. Alexander stated that 25% of the general population of black men have cases of PFB sufficiently severe that shaving abstinence would be recommended. C.A. App. 229.

White males, by contrast, "can be expected to rarely experience shaving difficulties from *any* skin disorder and are unlikely to abstain from shaving for therapeutic reasons." C.A. App. 431. Petitioners' own medical expert testified that, in his experience, every case of PFB that was sufficiently severe to require shaving abstinence as a treatment involved black men. C.A. App. 329.

2. Respondent Langston Bradley filed this suit, alleging that petitioners' policy has a disparate impact on the employment opportunities of black males in violation of Title VII of the Civil Rights Act of 1964. The district court subsequently granted the Equal Employment Opportunity Commission's motion to intervene. The Commission's complaint alleged that petitioners' no-beard policy violated Title VII, and sought backpay and other make-whole relief for Bradley and other black males adversely affected by the policy, as well as an injunction barring further en-

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[1] Respondents sought to elicit testimony from Dr. Alexander as to his opinion of the prevalence of PFB in the general population, but the district court refused to admit the evidence based on a lack of foundation. C.A. App. 228-229. The court of appeals held that the district court abused its discretion in failing to admit this evidence, because "[t]he record and [Dr. Alexander's] resume show that he has extensive experience in the field of dermatology, and has conducted studies, written articles, and lectured on the topic of PFB." Pet. App. a11.

forcement of the no-beard policy unless a medical exception for sufferers of PFB was provided.

After trial, the district court rejected respondents' disparate impact claim. Pet. App. a16-a28. The court found that Bradley "can appear clean shaven," and that, in general, "sufferers of PFB may induce remission" by use of methods "which will control if not cure the problem for sufferers." *Id.* at a20. Noting that there was no evidence of any other black male employees or applicants who were affected by the no-beard policy, the court concluded that petitioners had "failed to establish that there is a disparate impact on black males due to the no beard policy of Pizzaco and Domino's." *Id.* at a21.

In analyzing plaintiffs' statistical evidence, the district court agreed that PFB has a highly disproportionate effect on black males. Pet. App. a21. The court concluded, however, that respondents' failure "to define the labor market involved in this dispute" to include only qualified persons in the relevant geographic area undermined any probative value that respondents' statistics might otherwise have had. *Ibid.* The district court also required that the properly-defined labor market "be compared with the racial composition of those actually hired or within the employ of the employer," *id.* at a24, before a prima facie case could be made.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. a8-a15. The court of appeals reversed the district court's conclusion that respondents had not shown the disparate impact of the no-beard policy, finding that "[t]hrough expert medical testimony and studies, the EEOC demonstrated Domino's policy necessarily excludes black males from the company's work force at a substan-

tially higher rate than white males." *Id.* at a10. The court accepted the conclusion of respondents' expert that "approximately twenty-five percent of all black males cannot shave because of PFB," and that this statistical evidence was "representative of PFB's prevalence in, and impact on, the general black male population." *Id.* at a11-a12.

The court rejected the district court's conclusion that the respondents were required to define a qualified labor market for Domino's Pizza and to show the prevalence of PFB in that specific market, because "the disqualifying racial condition affects the black males without regard to geographical, cultural, educational, or socioeconomic considerations." Pet. App. a12 (citing *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977)). Nor were respondents required to adduce statistical evidence comparing petitioners' work force with the general labor market, because "a case can be made under Title VII by proving a specific hiring practice has a disparate impact, 'notwithstanding the bottom-line racial balance in [the employer's] workforce.' " Pet. App. a13.

Finally, the court of appeals affirmed the district court's factual finding that respondent Bradley is able to shave, based upon testimony that "Bradley has a mild case of PFB, and that at his next job, Bradley always appeared clean-shaven." Pet. App. a14. The court of appeals remanded the case with instructions for the district court "to proceed with the business justification stage of this disparate impact case." *Id.* at a15.

ARGUMENT

Petitioners claim that the court of appeals' analysis is "in direct conflict" with this Court's decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989). Pet. 6. But it is petitioners' theory of this case that is inconsistent with *Wards Cove*, as well as with several other of this Court's cases. Under well-established precedent, petitioners' no-beard policy, which has the effect of categorically excluding from job eligibility a high percentage of all black men and virtually no white men, is prima facie violative of Title VII.

1. Respondents established through medical and statistical evidence that the no-beard policy disproportionately affects black men, who as a class have a genetic predisposition to PFB that is not shared by white men. Neither court below disputed that such a showing had been made, and petitioners concede as much. Pet. 6, 10. It is true that respondents did not show that there was "a disproportion of black males in Dominos work force as compared to the proportion of black males in the labor market." Pet. 7. As the court of appeals held, however, petitioners' suggestion that such a showing was required is off the mark.

The notion that a disparate impact plaintiff must always demonstrate a "bottom line" effect on the employer's work force is directly contrary to this Court's decision in *Connecticut* v. *Teal*, 457 U.S. 440 (1982). In *Teal*, the Court held that the disparate impact of a specific job qualification may be shown in isolation even if, looked at as a whole, the entire selection process does not have a "bottom line" impact on the group; the Court recently reaffirmed this holding in *Wards Cove*, 490 U.S. at 653 n.8. Petitioners nonetheless rely (Pet. 8-9) on a different aspect of *Wards*

Cove, where the Court held that a comparison of an employer's work force with the relevant labor market can demonstrate an employment practice's disparate impact only if the bottom line disparity is causally linked to the specific practice under challenge. 490 U.S. at 656-657.

Petitioners' treatment of this portion of *Wards Cove* as establishing that a "bottom line" impact on an employer's workforce is a necessary predicate to any disparate impact claim cannot be reconciled with *Teal*. Nor can it be reconciled with *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971)—a case that petitioners simply ignore—in which imposition of a high school diploma requirement was held prima facie violative of Title VII solely because it disqualified blacks from job eligibility at a much higher rate than whites. Finally, petitioners' claim is directly contrary to *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-331 (1977), in which this Court held that a job qualification that had the effect of excluding women from job consideration at a far greater rate than men was a prima facie violation of Title VII, even though the plaintiffs there had not shown that the practice at issue had any effect on the applicant pool. Indeed, as in *Dothard*, the likely effect of the challenged policy is that "otherwise qualified people might be discouraged from applying," *id.* at 330; no refutation of this likely effect was offered.[2]

In this case, respondents showed at trial that the employment practice at issue categorically excluded

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[2] Petitioners' unsupported assertion that *Dothard* does not survive *Wards Cove* is incorrect. In fact, *Wards Cove* specifically referred to *Dothard*, and noted that Title VII plaintiffs can "rest their prima facie cases on [general population] statistics" if those statistics accurately reflect the pool of qualified job applicants. 490 U.S. at 651 n.6.

from the eligible job pool 25% of all black men. Under *Wards Cove*, 490 U.S. at 656-657, in order to make out a prima facie case, respondents were required to show that a specific employment practice (here, petitioners' no-beard policy) caused a specific impact on the employer's work force (here, by excluding from job eligibility one quarter of all black men). Nothing more was necessary.

2. Petitioners also complain (Pet. 7-9) that the statistical and medical evidence was not sufficiently tied to the qualified job applicant pool. This argument is sufficiently answered by *Dothard*, where the Court stated that reliance on general population statistics is sufficient if "there [is] no reason to suppose" that the statistics at issue "differ markedly from those of the national population." 433 U.S. at 330. In this case, there is absolutely no reason to think—and petitioners have offered no reason to think, see Pet. App. a4, a12—that the general population in petitioners' geographic area is at all different from the national averages; indeed, petitioner Domino's Pizza, Inc. is a national employer. Petitioners cannot dispute the probative value of general population data on the basis that the pool of potential qualified applicants does not correspond with the general population because the jobs at issue in this case require no special qualifications. See *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308 n.13 (1977); *Teamsters* v. *United States*, 431 U.S. 324 (1977). As in *Dothard*, if petitioners "discern[ed] fallacies or deficiencies in the data offered," they were "free to adduce countervailing evidence of [their] own." *Dothard*, 433 U.S. at 331.

3. Petitioners argue that it was necessary for the respondents to show that "at least one [person] had suffered adverse action because of the rule." Pet. 7.

It is true that there was no actual victim of the policy before the court because respondent Bradley was able to shave as a factual matter. Petitioners' argument that this doomed the disparate impact claim is incorrect for several reasons.

First, petitioners cite no authority for the proposition that a disparate impact claim requires a showing that a specific individual was harmed by the policy at issue. To the contrary, it cannot be doubted that "statistical proof can alone make out a prima facie case." *Wards Cove*, 490 U.S. at 650. See also *Teamsters* v. *United States*, 431 U.S. at 339. As the Court stated in *Hazelwood School District*, 433 U.S. at 307-308, "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." The court of appeals pointed out the obvious reason, which is that "a discriminatory work policy might distort the job applicant pool by discouraging otherwise qualified workers from applying." Pet. App. a13.[3] Because the evidence that was offered so clearly demonstrated disparate impact, respondents had no need to seek other types of evidence. *Dothard*, 433 U.S. at 331.

Second, a blanket rule of the sort petitioners propose—that, no matter how strong the statistical evidence, proof of disparate impact must always in-

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[3] Petitioners argue that there "was no evidence of any chilling effect offered." Pet. 10. This Court has not, however, required any such evidence, but has simply relied on the logical probability that "otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Dothard*, 433 U.S. at 330. Petitioners offer no basis for departing from this principle.

clude identification of an individual affected by the challenged practice—would unduly harm the Commission's enforcement efforts. The Commission is empowered to seek injunctive relief to vindicate the public interest in eradicating employment discrimination, even in the absence of a co-plaintiff who has been specifically harmed. *EEOC* v. *United Parcel Service*, 860 F.2d 372 (10th Cir. 1988). The Commission routinely investigates cases of possible employment discrimination where the charging party is a member of the Commission rather than a private party. § 706(b), 42 U.S.C. 2000e-5(b); see also 29 C.F.R. 1602.7 (detailing certain reporting forms that some employers must file with the Commission). The Commission's investigation of a private charge may reveal a discriminatory practice, but may also show the charging party was not a victim of the practice. In such cases, the Commission can sue to end the practice while declining to seek relief for the charging party. In any of these situations the Commission may bring an action against an employer as the sole plaintiff.

In such cases, whether there is an identifiable individual who has been victimized by the challenged policy is a question of relief, and not one of liability. If no specific victims can be identified in a pattern-and-practice suit, then relief may and should properly be limited to enjoining the discriminatory practice.[4]

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[4] We note in this context that petitioners' contention (Pet. 9) that the Commission is seeking "a national and broad reaching injunction * * * which would affect more than 100,000 employees" is misleading. As the court of appeals observed, the Commission "seeks an injunction requiring Domino's to recognize an exception to the policy for black men who medically are unable to shave, *but does not dispute that Domino's is otherwise free to enforce its policy.*" Pet. App. a3 (emphasis added). The injunction the EEOC is seeking will af-

4. Petitioners' fundamental point is that no inference of disparate impact can be drawn from respondents' unchallenged statistical proof. As we have shown, however, under *Dothard*, 433 U.S. at 328-331, and *Teal*, 457 U.S. at 450, the categorical exclusion of a high percentage of the otherwise qualified labor pool establishes a prima facie case of disparate impact even if the policy at issue does not have a bottom-line effect on the employer's work force. Putting that aside, however, each court presented with statistical evidence similar to the evidence in this case—that, as a result of PFB, no-beard policies disproportionately affect black men—has agreed that the evidence demonstrated a disparate impact. *Richardson* v. *Quik Trip Corp.*, 591 F. Supp. 1151 (S.D. Iowa 1984) (finding disparate impact without analysis of actual effects on employer's work force); *EEOC* v. *Trailways, Inc.*, 530 F. Supp. 54 (D. Colo. 1981); *Woods* v. *Safeway Stores, Inc.*, 420 F. Supp. 35 (E.D. Va. 1976) (although policy had disparate impact, employer justified its business purpose), aff'd, 579 F.2d 43 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979).[5] Petitioners do not dispute this, but nonetheless urge that this Court grant review to correct the court of appeals' perceived error. To the contrary, this Court's review is unwarranted in the absence of any disagreement among the lower courts on the applicability of Title VII to no-beard policies.

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fect only employees and applicants who suffer from PFB and are unable to shave as a result.

[5] The only exception is *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980), a decision premised on the bottom-line theory this Court later rejected in *Teal*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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